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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 494

MARINE TRANSPORT LINES, INC., and
MARINE NAVIGATION COMPANY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA.

PACIFIC FAR EAST LINE, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

Marine Transport Lines, Inc., Marine Navigation Company, Inc. and Pacific Far East Line, Inc. pray that writs of certiorari issue to review the final judgments and orders of the United States Court of Claims entered in the above cases on July 12, 1956.

Opinions Below

The order of July 12, 1956 of the Court of Claims, in which it included its judgment and which disposed of both cases (R. 27), is not reported and is printed in the Appendix hereto, page 5a, *infra*. This order dismissed the petitions for the reason set forth in an opinion concurrently rendered in the case of *Smith-Johnson Steamship Corp.* v. *United States of America*. That opinion is reported at 142 F. Supp. 367 and is printed in the Appendix hereto, pages 6a-8a, *infra*. The latter opinion reversed the position of the Court taken in two earlier opinions on March 6, 1956. These are reported at 139 F. Supp. 298 and 139 F. Supp. 301. Both opinions are printed in the Appendix hereto, pages 9a-17a, *infra*.

Jurisdiction

The date of the judgments and orders of the Court of Claims is July 12, 1956 (R. 27). Appendix, pages 5a-8a, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

Questions Presented

28 U. S. C. 1491 confers jurisdiction upon the Court of Claims of any "claim against the United States founded either upon the Constitution or any Act of Congress". Petitioners brought suit in the Court of Claims for an accounting of profits paid to the United States under bare-boat charter agreements authorized by section 5 of the Merchant Ship Sales Act of 1946. Section 5(c) of that

Act incorporated section 709(a) of the Merchant Marine Act, 1936. The latter section prescribed the profit sharing terms. Petitioners allege that the United States exacted from them amounts in excess of the shares specified in section 709(a).

The bareboat charter agreements covered groups of vessels. The expenses and profits in the operation of these vessels were merged in the accounting of profits so that the profits could not be attributed to any identifiable vessel. Consequently, a libel *in rem* would not lie if the ships had been privately owned. The questions presented are:

(1) Whether the Suits in Admiralty Act is applicable to a suit for an accounting of profits where there is no identifiable vessel that could have been libelled; (2) assuming that, in these circumstances, a suit in admiralty could be maintained against the United States, whether the Court of Claims does not concurrently retain its long-established jurisdiction of claims, such as these, founded upon an Act of Congress.

The Statutes Involved

The statutes involved are 28 U. S. C. 1491; the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741, 742; the Merchant Ship Sales Act of 1946, Section 5, 60 Stat. 43, 61 Stat. 191, 50 U. S. C. App. 1738; and the Merchant Marine Act, 1936, Section 709(a), 49 Stat. 2010, 46 U. S. C. 1199(a). These appear in the Appendix, pages 1a to 4a, *infra*.

Statement

Petitioners are two of forty-six companies which brought suit in the Court of Claims for the recovery of excessive amounts of profit exacted by the United States allegedly in violation of section 709(a) of the Merchant Marine Act, 1936.

The charter agreements were drafted by the United States Maritime Commission and petitioners were required to sign these agreements before they could receive any vessels under bareboat charter. The charter agreements provided that petitioners pay to the Maritime Commission and its successor, the Maritime Administration, as its share of profits, an amount in excess of the 50 percent prescribed under section 709(a) of the Merchant Marine Act, 1936.

Pursuant to the charter agreements, petitioners made preliminary payments of portions of their profits as additional charter hire. In order to ascertain petitioners' obligations for additional charter hire it was necessary to total the income from the operations of all the chartered vessels, subtract the total expenses and overhead and to deduct from the balance an amount equal to a 10 percent return on the charterer's capital necessarily employed. The resultant figure was then divided by the total number of voyage days of all the chartered vessels. This produced an average voyage profit from which the Government was paid on the following basis (Appendix, pages 11a-12a):

Cumulative net voyage profit	Government's share
up to and including $100—per day	50 percent
more than $100 but not more than $300—per day	75 percent
more than $300—per day	90 percent

The amounts payable to the Government were thus based upon the average voyage day income of a group of vessels. No part of this amount could be attributed to any single vessel.

It was common ground between petitioners and defendant that petitioners' suits were founded upon Acts of Congress. Defendant, however, relied upon a special defense of lack of jurisdiction of the subject matter. Defendant moved for summary judgment in *Marine Transport Lines* (R. 9) and moved to dismiss for lack of jurisdiction in *Pacific Far East Line* (R. 25). Its motions in both cases were denied below on March 6, 1956 (R. 9, 25), the Court holding that, the action being based on statute, it had jurisdiction. The Court also held that the action was not maritime and not cognizable in admiralty.

On defendant's motion the Court below on July 12, 1956, on the authority of *Sword Line, Inc.* v. *United States,* 351 U. S. 976, reversed its position and dismissed the petitions for lack of jurisdiction (R. 27). Certiorari is sought to review the decision of the Court below.

Reasons for Granting the Writ

Smith-Johnson Steamship Corp., one of the forty-six companies which filed suit in the Court of Claims for the recovery of excessive amounts of additional charter hire allegedly exacted by the Government in violation of statute, filed a petition for a writ of certiorari in this Court on August 28, 1956, Docket No. 353. That petition fully states the position of the instant petitioners with respect to the second question presented, namely, whether the Court of Claims does not concurrently retain its long-established jurisdiction of claims, such as these, founded upon an Act of Congress, even if, in the circumstances of these cases,

there is jurisdiction in admiralty under the Suits in Admiralty Act.

In the interest of brevity, the instant petitioners respectfully beg leave to rely upon the statement of facts and the reasons for granting the writ contained in the *Smith-Johnson* petition. Petitioners here will refrain from burdening the Court with a repetition of the statement and reasons therein contained.

With respect to the first question presented, to wit, whether the Suits in Admiralty Act is applicable to a suit for an accounting of profits where there is no identifiable vessel against which a libel *in rem* could have been brought, the following considerations are respectfully called to the Court's attention.

1. The decision below on an important question of Suits in Admiralty Act jurisdiction is in conflict with decisions in the First, Second and Third Circuits. *Balboa Shipping Co., Inc.* v. *Standard Fruit and Steamship Co.*, 85 F. Supp. 312 (D. C. N. Y., 1949), appeal dismissed, 181 F. 2d 109; *Pennsylvania R. R. Co.* v. *United States*, D. C. S. D. N. Y. (unreported, see Appendix, pages 27a-32a); *Burkholder* v. *United States*, 56 F. Supp. 196 (D. C. E. D. Pa., 1944); *Coastwise Transportation Co.* v. *United States*, 43 F. 2d 401 (D. C. Me., 1930).

2. Moreover, jurisdiction in the Court of Claims of these charter accounting cases would permit the disposition of all issues by decision in a limited number of cases, the principles of which would be controlling in all the others because of the substantial similarity of facts and issues in all of them.

The holding that the Court of Claims is without jurisdiction must necessarily result in a vastly greater number of motions, trials, appeals, etc., in many different District

Courts and Courts of Appeals. Because the Government had asserted the lack of jurisdiction in the Court of Claims, protective libels were filed in the various District Courts. So far as counsel has been able to ascertain at this point, there are now pending either in the various District Courts or on appeal therefrom the following numbers of cases all involving similar charter accounting disputes:

Southern District of New York	16
Western District of Washington,	
Northern Division	3
Southern Division	1
District of Massachusetts	2
Eastern District of Louisiana, New Orleans Division	2
District of Delaware	2
Northern District of California, Southern Division	3

Undoubtedly there are many other cases pending.

In only one of these cases have the merits yet been decided. In that case, *Dichmann, Wright and Pugh, Inc.*, No. A. 182-397, Southern District of New York, Judge Dimock, on September 29, 1956, overruled the Government's exceptions to the libel, holding, on the merits, that section 709(a) of the Merchant Marine Act, 1936, was controlling and that the statutory profit sharing scheme prescribed therein had not been complied with by the Government. A copy of Judge Dimock's decision appears in the Appendix at pages 18a-26a.

With respect to the other cases, a multiplicity of proceedings and diversity of decisions will be inevitable. Thus, in the Second Circuit it has thus far been held that those libels filed more than two years after redelivery of the last chartered vessels were time barred, although Judge Learned

Hand dissented because he thought there was a mutual open account between the parties and that the parties had agreed to hold the account open until the Government had made a final audit of the charterer's accounting. *Sword Line, Inc.* v. *United States*, 228 F. 2d, 344, affirmed on rehearing, 230 F. 2d 75, certiorari granted only on the question of admiralty jurisdiction and affirmed, 351 U. S. 976. See also *American Eastern Corp.* v. *United States*, 133 F. Supp. 11, affirmed, 231 F. 2d 664, certiorari denied, 351 U. S. 983; *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58. In conflict with the majority in *Sword Line*, however, in *Pacific-Atlantic Steamship Co.* v. *United States*, Judge Schweinhaut in the District of Columbia in an unreported decision (Docket No. 3404) held in a similar case that the libel was not time barred because there was a mutual open account and the date of the last item was within two years of the filing of the libel. He denied the Government's motion to dismiss the suit as time barred. The case was subsequently transferred to the Delaware District Court. Here the Government again raised the time-bar question. Chief Judge Leahy held that he was not bound by Judge Schweinhaut's decision but that, in any event, the statute of limitations question should be decided upon testimony preferably at a separate trial of that issue. 127 F. Supp. 931 (1955). Already then there are three conflicting decisions in as many Circuits on the question of statute of limitations alone.

Moreover, the question of statute of limitations, as well as the merits, raised by the Government's exceptions is now before Judge Herlands in the Southern District of New York in four cases, *Blidberg Rothchild Co., Inc.*, No. A. 188-69, *W. R. Chamberlin & Co.*, A. 184-186, and *Fall River Navigation Company*, A. 187-266, A. 187-267. And in the Northern District of California, Judge Goodman has

before him the statute of limitations question raised by Government exception in *Pacific Transport Line* v. *United States*, A. 27101. Within a short time he will also have before him the same question in *Pope & Talbot, Inc.* v. *United States*, A. 27161.

These are merely illustrative. There will be a host of additional proceedings and appeals, conflicting decisions and finally a series of petitions for certiorari in this Court to resolve the conflicts.

The fragmentation of litigation, adding substantially to the burdens of litigants and already overcrowded court dockets, is the inevitable result of divesting the Court of Claims of its long practiced jurisdiction of accounting disputes between the Government and its contractors. The splitting of the litigation into a multitude of separate, but actually duplicated proceedings, warrants review by this Court.

1. The Court below misconstrued the applicability of the decision of this Court in *Sword Line, Inc.* v. *United States*, 351 U. S. 976. That case did not involve an accounting of profits because there was a compromise in bankruptcy into which all previous obligations had been merged. 228 F. 2d, at 348; 230 F. 2d, at 75-76. In the instant cases, however, the question of accounting of profits is basic, turning upon the statutory provision for the sharing of profits.

That admiralty is without jurisdiction of an accounting of profits, even under a maritime contract, is well established. *Ward* v. *Thompson*, 22 How. 330 (1859); *The Steamboat Orleans* v. *Phoebus*, 11 Pet. 175 (1837); *Minturn* v. *Maynard*, 17 How. 477 (1855); *Vanderwater* v. *Mills*, 19 How. 82 (1856); *Grant* v. *Poillon*, 61 U. S. 162 (1858); *Duryee* v. *Elkins*, Fed. Cas. No. 4197; *Davis* v. *Child*, Fed. Cas. No. 3628.

It is of course recognized that admiralty, once it has jurisdiction, will not necessarily be divested of jurisdiction "when an accounting is necessary to the complete adjustment of rights." That was the teaching of *Hedger Transp. Corp.* v. *Bushey,* 155 F. 2d 321 (C. A. 2, 1946), certiorari denied, 329 U. S. 735. There, a mortgage had been foreclosed in admiralty. After admiralty had entered its decree the accounting issue arose. Judge Hand held, at page 323:

> * * * it has never been true, when an accounting is necessary to the complete adjustment of rights over which admiralty has independent jurisdiction, that it will suspend its remedies midway and require the parties to resort to another court.

But Judge Hand, noting the foregoing exception, also stated the general rule:

> It is true that a court of admiralty will not entertain a suit for an accounting as such * * *

In the instant cases, the accountings are not incidental, they are the bases of the suits. The question therefore is not whether the jurisdiction of admiralty is to be divested but whether there is such jurisdiction in the first instance. And as to that it is the general rule and not the exception that applies. We think Judge Ware's statement in *The Larch,* Fed. Cas. No. 8085, reversed on other grounds, Fed. Cas. No. 8086, is still the law:

> First, if the settlement of the account is the sole object of the suit, it is clear that the court has not jurisdiction, although it might have over each particular item. Secondly, when it is not the sole object, if it is apparent from the pleadings that this is one principal object, though not the sole one, and the accounts are long and intricate and multifarious, the court will decline to take jurisdiction.

Cf. *Swift & Co.* v. *Compania Colombiana,* 339 U. S. 684, 692-693 (1950).

The assumption below, that *Sword Line,* which did not involve an accounting of profits, overturned this long established principle was unwarranted and the dismissal of the petitions, we submit, was error.

2. A further point of distinction between the instant cases and *Sword Line* is that the question of Suits in Admiralty Act jurisdiction, *absent an identifiable vessel,* was neither raised nor decided in this Court.

Section 2 of the Act provides for admiralty jurisdiction

> in cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for * * *

As already pointed out, the accounting of profits here involved did not concern nor could it be related to any specific vessel. The operating results of all the vessels were merged. Losses in the operation of some vessels were offset against profits of others and the overall results were averaged into a daily profit for the group as a whole. No part of the profit, any more than the office overhead or capital employed, can be traced to any vessel. And the merger of operating results and loss of identity of the individual vessels had already taken place at the time of the commencement of the suits below. For the profits had already been paid to the Government on the basis of this merger.

It is a *sine qua non* of admiralty jurisdiction that the subject matter relate to an identifiable vessel. "Maritime causes naturally center around the ship, the great agent of maritime enterprise and affairs," 1 Benedict, *Admiralty*

(6th ed. 1940), page 123. "Transactions are 'maritime' only when in some way connected with a 'vessel'." Robinson, *Admiralty* (1939), page 42.

The jurisdictional prerequisite of an identifiable vessel is more readily seen in the cases *in rem*. See 1 Benedict, *Admiralty*, pages 22-23, and cases cited therein.

In earlier days a libel *in personam* could not be maintained where a libel *in rem* could not be. In *The Underwriter*, 119 Fed. 713 (D. C. Mass., 1902), Judge Lowell, in a distinguished and scholarly dissertation, pointed out, at page 742:

> Judge Story asserted that a libel in personam could be maintained where a libel in rem could not be. Except from his own intimation in The Jerusalem, above referred to, no court or judge, so far as is known, had ever suggested this distinction, while not a few courts had suggested that precisely the opposite distinction was maintainable.

And again at pages 743-744:

> The opinions of Mr. Justice Story have prevailed all along the line, but there is no doubt that Mr. Justice Johnson clearly established as a matter of history that in permitting a libel in personam where he denied a libel in rem the former had asserted a doctrine hitherto unknown to any law.

See concurring opinion of Justice Johnson in *Ramsay* v. *Allegre*, 12 Wheat. 611 (1827).

It follows from this that suits *in personam*, like those *in rem*, were cognizable in admiralty only if they were concerned with an identifiable vessel. And the abandonment of the principle that there was no jurisdiction of the former where jurisdiction of the latter was wanting, does not detract from the continued existence of the jurisdictional requirement that an identifiable vessel be involved.

Moreover, as is shown, *infra*, jurisdiction under the Suits in Admiralty Act, as distinguished from general admiralty jurisdiction, does not lie *in personam* unless a recovery, but for the Act, could have been had *in rem*.

In *Diefenthal* v. *Hamburg-American Line*, 46 Fed. 397 (D. C. E. D. La., 1891), a libel *in personam* was brought to recover damages for breach of a contract to purchase supplies for a group of vessels. The libel was dismissed for want of jurisdiction, the court saying, at page 399:

> It need not be held that there could not be an admiralty suit in some cases where there is no maritime lien. But where the contract is for supplies, to bring it within the admiralty jurisdiction it must come within the reason that brings material-men within the dominion of admiralty courts,—i. e., it must appear that the necessities or conveniences of ships in ports remote from home ports require that a credit should be given and a debt created which, though arising on land, are distinctively maritime, because necessary to maritime commerce as conducted by ships. *It must begin and end in the necessities of a particular vessel for her own voyage.* (Emphasis added.)

The same rule was applied where the owner of a group of vessels brought a libel *in personam* against a supplier for breach of contract to furnish fuel for groups of vessels in *Garcia* v. *Warner, Quinlan Co.*, 9 F. Supp. 1010 (D. C. S. D. N. Y., 1934), and in *Steamship Overdale Co.* v. *Turner*, 206 Fed. 339 (D. C. E. D. Pa., 1913). Libels *in rem* to recover for supplies or services furnished, but not to a specific vessel, were similarly dismissed in *The Walter Adams*, 253 Fed. 20 (C. A. 1, 1918), affirmed, 254 U. S. 1; *The Cora P. White*, 243 Fed. 246 (D. C. N. J., 1917); *The James T. Furber*, 157 Fed. 126 (D. C. Maine, 1907); *The Cimbria*, 156 Fed. 378 (D. C. Mass., 1907).

Consequently, if the vessels had been privately owned a proceeding in admiralty could not have been maintained for the relief sought below. Suits in Admiralty Act jurisdiction is thus wanting for two reasons: (1) because there is no general admiralty jurisdiction since the accounting here involved does not relate, and cannot be related, to any specific vessel; and (2) because there is no jurisdiction under the Act where there could not have been a libel *in rem.*

Balboa Shipping Co., Inc. v. *Standard Fruit and Steamship Co.*, 85 F. Supp. 312 (D. C. N. Y., 1949), appeal dismissed, 181 F. 2d 109, held that reference to a specific vessel is a prerequisite to jurisdiction under that Act:

> Neither §742 nor §781 of Title 46 reads like a general consent on the part of the United States to be sued. The Suits in Admiralty Act is limited to cases where a proceeding in admiralty could be maintained "if *such* vessel were privately owned or operated, or if *such* cargo were privately owned and possessed." §742 The Public Vessels Act is limited to claims "for damages caused by a public vessel". §781.
>
> It strains the language and I think it also strains the purpose of the statutes to read them, as libellant would read them, as authorizing suit against the United States without reference to a specific vessel. See Ryan Stevedoring Co., Inc. *v.* United States, 2 Cir., 1949, 175 F. 2d 490 (pp. 312-313, italics the court's.)

In *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, this Court held that the Suits in Admiralty Act was applicable to a case where a suit *in rem* would have lain had the offending vessel survived. In that case libels were brought to recover the value of goods carried on a merchant vessel owned by the United States. It was alleged that the vessel

had deviated from the agreed voyage and by reason thereof had stranded and become a total loss with all her cargo. It was held that jurisdiction lay under the Suits in Admiralty Act. This Court said at page 212:

> In *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 689-692 (1927), we held that, while the main purpose of the Act was to exempt from seizure and arrest merchant vessels of the United States operated by it and its subordinate shipping corporations and to substitute for a suit *in rem* one *in personam* attended with the incidents of a proceeding *in rem* in which the personal liability of the United States took the place of the vessel, the Act also had a wider effect and created a broader personal obligation of the United States, *as the owner of an offending vessel,* like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem.* (Emphasis added.)

Had the vessel survived, a libel *in rem* would have been an appropriate remedy. But where, as in the instant cases, libels *in rem* could not have been brought because there was no specific vessel to which the accounting of profits here sought could be related, the Suits in Admiralty Act is not applicable.

Set out in the Appendix herein at pages 27a-32a, is an unreported opinion dated May 7, 1956, by Judge Ryan in *Pennsylvania R. R. Co.* v. *United States,* Southern District of New York, Civil No. 72-294. There plaintiff sued under the Tucker Act for damage sustained by its barge while it was in the possession of the United States. Defendant asserted that the suit was maintainable exclusively under the Suits in Admiralty Act and was time barred. Both

sides moved for summary judgment. Holding that the plaintiff was entitled to judgment, Judge Ryan said:

> The significant difference between the *Eastern Transport* and *Rosenberg* cases and the instant case is that there the claims pleaded were predicated on an in rem liability which would have subjected the vessels to seizure had they been in existence and privately owned, and permitted a recovery in rem, whereas here the claim pleads a purely personal liability which at no time could have permitted a remedy or recovery in rem. This distinction was recognized by Judge Kirkpatrick in *Burkholder* v. *United States*, 56 F. Supp. 106 (E. D. Penn. 1944) and by Judge Dimock in the memorandum filed in this case on June 14, 1955. *Prudential S. S. Company, Matson Navigation Co., supra,* and *Aliotti* v. *United States* (C. A. 9, 1955), 221 F. 2d 589 are not to the contrary, for in each of those cases the vessel or cargo in question could have been libeled.
>
> Thus, it is essential to the filing of a libel under the Suits in Admiralty Act that the claim be of a nature enforcible by a proceeding in rem. No libel in rem could ever have been filed here; the court would have been without jurisdiction under the statute; plaintiff's only available remedy lay at law under the Tucker Act upon a contract (C. F. Harms Co. *v.* Erie R. R., 167 F. 2d 562, CA 2, '48); the suit was timely filed and judgment is awarded the plaintiff. Submit decree.

See also *Coastwise Transportation Co.* v. *United States*, 43 F. 2d 401 (D. C. Me., 1930).

The fact that the instant suits are concerned with an accounting of profits, after all the chartered vessels had been redelivered, and thus are not capable of relation to any specific vessel which, in any circumstances, could have been libelled *in rem*, places the suits beyond the reach of

admiralty and renders the Suits in Admiralty Act inapplicable. The court below erroneously considered itself divested of its long standing jurisdiction of such suits.

Conclusion

The writs should therefore be granted.

Respectfully submitted,

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